United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL 75-6108

United States Court of Appeals

For the Second Circuit.

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P/S

EDWARD KAVAZANJIAN, FRANK BENEMIO, EDWARD BERTELE, FRANK COSTAS, JOSEPH D'AMICO, JOSEPH FARRELL, ALEX FLASTERSTEIN, MARTIN GREENFIELD, JOHN MARTIN, ARTHUR OPPOLION, PETE SCALCIONE, AND, AS A CLASS, ALL INVESTIGATORS OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE LOCAL NO. 1917 (American Federation of Government Employees AFL-CIO), AND NATIONAL COUNCIL OF IMMIGRATION AND NATURALIZATION LOCALS,

Plaintiffs-Appellants,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, THE U.S. CIVIL SERVICE COMMISSION, and THE UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Plaintiffs-Appellants
515 Madison Avenue
New York, N.Y. 10022
(212) 688-8555

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

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v.

U.S. IMMIGRATION & NATURALIZATION SERVICE et al.,
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APPELLANTS REPLY BRIEF

This brief is submitted in reply to the Brief For Appellees filed and served herein.

THE DECISION OF THE SUPREME COURT IN UNITED STATES V. TESTAN DOES NOT RENDER THIS APPEAL MOOT

In their brief, the appellees urge that the recent decision of the Supreme Court in *United States v. Testan*—US—, 44 U.S.L.W. 4245 (Mar. 2, 1976) renders this appeal moot. The Government is, in effect, arguing that *Testan* eliminates the judicial remedy of retroactive pay in *any* form in a classification dispute.

What the Government overlooks is the fact that the *Testan* decision was predicated entirely upon a determination by the Supreme Court that the jurisdiction of the Court of Claims is limited to adjudication of pure claims for money damages against the United States founded

upon statute or contract (44 USLW at 4247). In short, the Court found that the Tucker Act, 28 U.S.C. Sec. 1491, as interpreted by such decisions as *United States v. King*, 395 U.S. 1 (1969), vests the Court of Claims with jurisdiction over a cause *only* when a pre-existing right to money damages is present; and the Court of Claims does not have equitable powers except as they may be incidental to its power to enforce a right to money due from United States.

What the appellees ignore is the fact that the present action is in the United States District Court, and not in the Court of Claims. The District Court is clearly imbued with substantial and traditional equitable powers, and in particular has been given express mandamus jurisdiction under 28 U.S.C. Sec. 1361. In fact, the Supreme Court expressly noted that the District Court *would* have jurisdiction to rectify improper Civil Service Classification under the Mandamus Statute. (See 44 USLW at 4249, and 4248, n. 5.)

It is well established that mandamus jurisdiction includes the right to compel the Government to disgorge liquidated sums of money wrongfully withheld by federal officials or agencies where there is a duty of payment. This power has recently been made clear in several cases wherein state and local governments have invoked the mandamus jurisdiction of the District Court, over governmental assertions of Sovreign Immunity, to compel federal officials to pay moneys due under various Federal assistance programs. *See*, e.g. *City of New York v. Ruckelshaus*, 358 F.Supp. 669 (D.C. DC 1973), *aff'd, sub. nom City of New York v. Train*, 494 F.2d, 1033 (D.C. Cir. 1974); aff'd 420 U.S. 35 (1975); *Minnesota v. Weinberger*, 359 F. Supp. 789 (1973); *United States v. Commonwealth of Pennsylvania*, 394 F.Supp. 261 (M.D. Pa. 975). In such cases,

the Courts have not issued a money judgment as such, but have utilized their mandamus jurisdiction to compel federal officials to perform a duty owed to plaintiffs, i.e., the payment of a definitely ascertainable sum of money as required by statute.

In the present case, should it be determined, either by the Court, or the United States Civil Service Commission on remand, that the appellants herein were improperly classified, the precise amount of money improperly withheld by the Government could be readily computed for each plaintiff and member of the plaintiff class. Under the mandamus jurisdiction found in 28 U.S.C. 1361, the Court could order that such liquidated sum, once computed, be paid by the Government to the classification appellants. We submit that such judicial action is not distinguishable from the action taken by the Courts in compelling the Government to pay states and municipalities sums determined to have been withheld contrary to statutory federal assistance programs.

In urging the above, appellants are not unmindful of the fact that the Supreme Court in acknowledging mandamus jurisdiction over classification disputes noted that "it, too, seemingly is only prospective . . ." 44 L.W. 4249. It is important to note, however, that the Court intentionally refrained from passing on this point, and left the question open with little more than a hint of its possible view on the matter.

Furthermore, even if mandamus jurisdiction is "only prospective" it is clear that such prospective relief should begin on the *date of the commencement of the action*, and not on the date of final judgment. At the time an action to compel reclassification is brought, the Court possesses the power to compel promotion to the higher grade requested.

If the process of litigation results in delay, as it invariably does, the Court has the inherent power to order that a favorable determination relate back to the date of commencement of the action, and to order that retroactive promotion and payment relate back to the commencement of the action as well. To hold that such retroactive power is not inherent in the Courts' mandamus jurisdiction would be to permit the Government to profit from delays in the litigation process, whether or not those delays are attributable to its own actions, and would justify the commencement of federal classification actions with orders to Show Cause on the ground that plaintiffs would otherwise suffer irreparable injury. It is clearly more logical to assume that the inherent power of the Court would permit any ultimate relief granted in the form of higher classification to *relate back* to the date of commencement of the action. There is certainly nothing in the *Testan* decision which is inconsistent with this position, in that the rationale of *Testan* dealt only with the absence of a right to back pay *prior* to the commencement of an action in the Court of Claims. We submit that the right to retroactive classification and payment, at least to 1969, exists here and precludes this appeal from being dismissed as moot.

We also wish to note that even assuming that the appellees are correct, and there is no right to back pay, that the present action would not be moot. Although all of the plaintiffs and members of the plaintiff class who testified had either retired, been promoted, or both, their present pension payments or in-grade pay steps are not unrelated to the grades which they held during the period of wrongful classification complained of. Clearly if retroactive promotions are ordered by the Court, even in the absence of retroactive pay, future pension benefits and annual step

increases would have to be recomputed in order to properly credit appellants for time at the higher grade. Such recomputations would undoubtedly result in higher future payments and benefits, and for this reason alone, the action should not be considered moot.

CONCLUSION

On the basis of the above, and the investigators Brief in Chief, it is respectfully requested that the decision of the District Court be reversed.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Appellants
515 Madison Avenue
New York, N.Y. 10022
Telephone No. 688-8555

Martin L. Rothstein
Of Counsel

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of April , 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Reply Brief upon Patrick Barth, Esq., Asst. U.S. Attorney herein, by delivering a true ~~xxxx~~ 5 true copies the Appellee copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the A-pellee therein.

Sworn to before me,
this 16 day of April 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, ~~1978~~ 1977